Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., AND
GWALTNEY OF SMITHFIELD, LTD.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL H. COLE
CHARLES T. GRIFFITH
SMITHFIELD FOODS, INC.
200 Commerce Street
Smithfield, Virginia 23430
(757) 365-3030

PATRICK M. RAHER
JOHN G. ROBERTS, JR.*
JAMES T. BANKS
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioners

165 pp

QUESTIONS PRESENTED

1. Whether the Fourth Circuit properly held—in conflict with *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 61 (1987), and the intent of Congress—that the Clean Water Act permits the United States to bring a penalty action after a State—the primary regulatory authority under the statute—has agreed "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action."

2. Whether the Fourth Circuit properly held—in conflict with the First and Eighth Circuits—that state law must mimic federal law to be regarded as "comparable" under the Clean Water Act, so that a state enforcement action precludes a federal penalty action for the same violations.

3. Whether the Fourth Circuit properly held—in conflict with the D.C., Fifth, Sixth, Ninth, and Tenth Circuits—that petitioners had fair notice that they were violating the Clean Water Act where the State—the primary regulatory authority under the statute—specifically assured petitioners that they would be in compliance with a state limit not regulated by federal law by taking certain corrective action, and where EPA had notice of such assurances but waited five years before filing an action for alleged violations of that limit, by which time substantial penalties had accrued.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties that appeared in the Fourth Circuit. Smithfield Packing Company, Inc. and Gwaltney of Smithfield, Ltd. are wholly-owned subsidiaries of Smithfield Foods, Inc. Smithfield Foods, Inc. is a publicly held corporation and has no parent corporation. No publicly held entity owns 10% or more of Smithfield Foods, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Smithfield Foods, Inc., Smithfield Packing Company, Inc., and Gwaltney of Smithfield, Ltd. (collectively, "Smithfield"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 191 F.3d 516 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Virginia on liability issues is reported at 965 F. Supp. 769 and reproduced at App. 63a. The opinion of the District

Court on penalty issues is reported at 972 F. Supp. 338 and reproduced at App. 29a.

JURISDICTION

The judgment of the Fourth Circuit was entered on September 14, 1999. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on January 6, 2000. App. 114a. On March 27, 2000, the Chief Justiee entered an Order extending the time for filing a petition for certiorari to and including May 5, 2000. App. 116a. The jurisdiction of the Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Section 510 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1370, provides in pertinent part:

> Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharges of pollutants * * *; except that if an effluent limitation * * * is in effect under this [Act], such State * * * may not adopt or enforce any effluent limitation * * * which is less stringent than the effluent limitation * * * under this [Act].

Section 309(g)(6)(A)(ii) of the CWA, 33 U.S.C. § 1319(g)(6)(A)(ii), provides in pertinent part:

[A]ny violation—

* * *

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [Section 309(g) of the Act, 33 U.S.C. § 1319(g)]

* * *

shall not be the subject of a civil penalty action under [Section 309(d) of the Act, 33 U.S.C. § 1319(d)].

Sections 309(d), 309(g), and 510 are reproduced in full at App. 117a-124a.

INTRODUCTION

This case arises out of the imposition of a civil penalty—$12.6 million—that when entered was the largest ever assessed under the CWA. Yet the most significant aspect of this case is not the size of that penalty, but the policy dispute that arose between state and federal authorities over whether a penalty was appropriate at all. Smithfield was caught in the middle of that dispute. Under an agreement with Virginia regulatory authorities—charged with primary responsibility under the CWA to enforce the regulatory standards at issue—Smithfield invested millions of dollars to comply with a state limitation on an effluent constituent (phosphorous) not regulated by federal law, taking action it was otherwise under no obligation to take and that conferred a substantial benefit on the Commonwealth and its residents. Years later, however, Smithfield was blind-sided by federal authorities in this action seeking penalties for exceedences of the very limits that Virginia regulatory authorities—in order to secure Smithfield's agreement to enter into a multimillion dollar compliance plan—had assured Smithfield it need *not* meet.

In addition to concerns about the fundamental fairness of a regulatory regime that permits such a result, this case raises significant federalism concerns about the respective roles of the States and the federal government in administering one of the Nation's most important and far-reaching environmental laws. In enacting the CWA, Congress specifically sought to promote comity by giving the States primary authority to enforce the limits in the permits they issue under the Act, and the discretion to "adopt or enforce" environmental standards more stringent than those imposed by federal law. 33 U.S.C. § 1370. By bringing this overfile action for exceedences inherent in a state-approved compliance plan, EPA has "curtail[ed] considerably" the "discretion" of a primary regulatory authority "to enforce the Act in the public interest," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987), and thereby upset Congress's intentions in enacting the CWA. The Fourth Circuit below not only sanctioned this result, but did so in a manner contrary to the decisions of this Court and other federal courts of appeal. The multiple conflicts engendered by the decision below concern matters of grave importance. This Court should grant review and resolve them here.

STATEMENT OF THE CASE

Smithfield operates two pork processing plants in Isle of Wight County, Virginia. Until recently, these plants discharged treated effluent into the Pagan River under permits issued by the Virginia State Water Control Board ("Board"). The Board is authorized by EPA to issue such permits under the CWA, *see* 33 U.S.C. § 1342(b), and has "primary" authority to enforce the effluent limitations they contain. *See id.* § 1251(b); EPA, *Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III EPA* 1 (1975). This case arises over a dispute

between federal and state authorities over enforcement of a state limit contained in Smithfield's permit.

A. State Enforcement Action.

1990 Permit and Special Order. In 1988, the Board promulgated regulations that, for the first time, limited the amount of phosphorous—a substance not regulated with respect to meat processors or the Pagan River under federal law—that could be discharged into Virginia waterways. *See* Va. Admin. Code tit. 9, § 25-40-10, *et seq*. Shortly thereafter, Smithfield filed an action in state court, arguing in part that the limit the Board sought to impose was not technologically achievable. Meanwhile, on January 4, 1990, Smithfield's existing permit was modified to include the phosphorous limit and a three-year compliance schedule requiring Smithfield to upgrade its wastewater treatment facilities to meet the limit. Smithfield promptly filed a challenge to the modified permit (the "1990 permit") with the Board on the same grounds raised in state court. If successful, Smithfield's administrative and judicial challenges could have prevented the Commonwealth from applying its new phosphorous limit not only to Smithfield but throughout Virginia.

Negotiations between the parties ensued. On March 21, 1990, Smithfield's administrative challenge was settled by means of a consent order (the "1990 Special Order"). Under that Order, the Board agreed to postpone commencement of the 1990 permit's compliance schedule in exchange for Smithfield's agreement to study a proposal that it reroute its wastewater to a treatment plant operated by the Hampton Roads Sanitation District ("HRSD")—something Smithfield was otherwise under no obligation to do. This solution would not only allow the Board to achieve the broader environmental objective of completely eliminating Smithfield's discharge of effluent into the Pagan River, but the resulting pipeline would also allow the Town of Smithfield

and other area residents to hook up to HRSD, removing their pollutants from the Pagan River as well. A copy of the 1990 Special Order was sent to EPA.

1991 Special Order. On May 9, 1991, the Board issued another order (the "1991 Special Order") which resolved Smithfield's judicial challenge to the state phosphorous standard. That Order required Smithfield to advise the Board no later than June 14, 1991 of its "commitment to connect to HRSD *or* to upgrade [its] facilities to comply with the * * * phosphorous standard." 4th Cir. J.A. 79 (emphasis added). The Order also required Smithfield—if it decided to connect to HRSD—to do so within three months of notification *by HRSD* that the connecting pipeline was available. If Smithfield elected *not* to connect to HRSD, the Order required it to submit, by August 15, 1991, a schedule for completing the facility upgrades necessary to comply with all effluent limitations. Pursuant to the Order, Smithfield dismissed its judicial challenge to the phosphorous standard. A copy of the 1991 Special Order was sent to EPA.

On June 7, 1991, Smithfield notified the Board of its decision to connect to HRSD. Thus, after eighteen months of negotiations, the Board obtained a commitment from Smithfield to *completely* eliminate its discharges into the Pagan River, with the further result that the Town of Smithfield and other area residents would also stop discharging their pollutants into the river by connecting to HRSD. This result ultimately benefited the environment and the people of Virginia more than continuing discharges in compliance with the new phosphorous limit would have—assuming that limit would have even survived Smithfield's legal challenges.

1992 Permit. In 1991, Smithfield's permit was due for routine reissuance. The Board prepared and submitted for EPA review and public comment a draft permit that carried forward the standards in the modified 1990 permit. To

ensure that the permit would be construed in a manner consistent with its settlement with the Board, Smithfield reminded the Board in writing on October 1, 1991, that the compliance dates in the draft permit could not be met "now that we have agreed to abandon plans to upgrade our existing facilities and tap onto HRSD when it becomes available," and requested that

> if [the] compliance dates and milestones [were] required in the proposed permit, some documentation or letter be provided by the State Water Control Board stating that alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs. [4th Cir. J.A. 84 (emphasis added).]

On October 10, 1991, the Board assured Smithfield that it would be in compliance if it connected to HRSD pursuant to the agreement and that it was *not* required to meet the phosphorous limit in the permit during the interim:

> The compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations. *Any special order agreements relative to compliance * * * that have been approved by the Board take precedence over the VPDES Permit.* [*Id.* 86 (emphasis added).]

EPA received a copy of this written response—just as it had received copies of the Special Orders reflecting the parties' settlement agreement as to how Smithfield would meet the phosphorous limit—and attached the copy to its approval of the new permit kept in its files.

On January 3, 1992, the Board issued the new permit (the "1992 permit") to Smithfield. Although the 1992 permit maintained the new phosphorous limit, it was clear from the

1991 Special Order and the October 1991 exchange between the parties that the Board would consider Smithfield in compliance so long as it connected to HRSD within three months of availability. The 1991 Special Order required Smithfield to upgrade its own treatment facilities to comply only if it did *not* connect to HRSD, and the October 1991 exchange—provided to EPA—confirmed that the Order "[took] precedence" over the permit. *Id.*[1]

Smithfield's Corrective Action. After several delays not attributable to Smithfield, HRSD eventually completed construction of the pipeline, and by August 1997, Smithfield had completely ceased discharging effluent into the Pagan River and was routing all its wastewater to HRSD. In connecting to HRSD, Smithfield spent over $2.7 million upgrading its own facilities so that effluents could be properly pretreated before entering the HRSD system, plus some $300,000 for a pump station to serve the Town of Smithfield so that its wastewater could be routed to HRSD. Smithfield's annual user fees to HRSD for treatment are expected to total more than $2 million. Thus, Smithfield has and will continue to spend millions of dollars in cooperating with the Board to

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[1] The 1992 Permit also established new limits for ammonia, cyanide, and CBOD, requiring compliance by May 13, 1994. 4th Cir. J.A. 165. In February 1992, Smithfield advised the Board that it planned to comply with these limits by connecting to HRSD, and the Board confirmed that Smithfield's plan was acceptable. *Id.* Subsequently, in November 1994, the 1991 Special Order was amended to provide that Smithfield "may achieve compliance with the [effluent limitations for CBOD, total cyanide, and ammonia] by connecting to the HRSD system." *Id.* 166. This amendment thus exempted Smithfield from complying with the limitations for these effluents pending connection to HRSD, just as the 1991 Special Order itself provided that if Smithfield connected to HRSD it would not be required otherwise to comply with the limitation on phosphorous.

achieve the goal of ending Smithfield's discharges into the Pagan River.[2]

B. Federal Overfile Action.

Just as Smithfield was about to connect to HRSD, the United States brought this action against it for failing to meet the very state law limits the Board had assured Smithfield it was *not* required to attain during the interim. Although EPA had ample information since 1991 that made clear that—as a result of the compliance plan entered into as part of the Board's enforcement action—Smithfield was not required to comply with the phosphorous limit pending connection to HRSD, EPA never objected and did not bring this action until December 16, 1996, more than five years later.[3]

Liability Phase. On March 10, 1997, well before discovery had concluded, the United States moved for partial summary judgment on liability. App 63a. The District Court granted that motion on May 30, 1997, concluding that Smithfield was liable because the 1992 Permit "did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action." App. 82a. The court further ruled that, in any event, the 1990 and 1991 Special Orders were not relevant because EPA had never affirmatively agreed to be bound by

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[2] Smithfield's commitment to connect to HRSD was essential to enable HRSD to build the pipeline and upgrade its own facilities. To obtain funding for the project, HRSD applied to the Board for assistance from the Virginia Revolving Loan Fund, which is funded largely by EPA. EPA undertook a close review of the project in connection with the Commonwealth's approval of over $50 million in funding for HRSD to upgrade its facilities to implement the 1991 Special Order.

[3] The Commonwealth declined the invitation of the United States to join the federal suit and filed its own action in Isle of Wight Circuit Court on August 30, 1996, seeking injunctive relief and civil penalties against Smithfield for exceeding certain limitations for substances other than phosphorous, and penalties for a rogue employee's destruction of records.

them—even though it had received notice of and had never objected to them—and Smithfield had never taken the formal steps necessary to obtain a permit modification. App. 91a, 100a-101a.

The District Court also held that EPA's action was not barred by Section 309(g)(6)(A)(ii) of the CWA. That provision precludes a federal penalty action where a state agency has "commenced and is diligently prosecuting an action under State law comparable to [Section 309(g)]," 33 U.S.C. § 1319(g)(6)(A)(ii), which in turn provides for federal administrative penalty actions. Narrowly construing that provision, the court concluded that Virginia law was not comparable to Section 309(g) because at the time the Board commenced its action it could impose administrative penalties only with the consent of a violator, and because Virginia law did not provide for public participation rights identical to those found in Section 309(g). App. 104a-112a.

The court further rejected Smithfield's argument that the action was barred by Section 510 of the CWA, which provides that "nothing in [this Act] shall * * * preclude or deny the right of any State * * * to adopt or enforce" state standards more stringent than those in effect under the Act, such as Virginia's phosphorous limit. 33 U.S.C. § 1370. In so doing, the court dismissed out of hand Smithfield's argument—based on this Court's decision in *Gwaltney*, 484 U.S. at 61—that the authority of Virginia to enforce its own, more stringent phosphorus limit as it sees fit includes the discretion to forgo penalties in order to achieve a greater environmental goal—in this case, the complete elimination of discharges into the Pagan River. App. 112a-113a.

Penalty Phase. The case then proceeded to the penalty phase. The CWA authorizes the imposition of penalties for each day that a violation occurs. 33 U.S.C. § 1319(d). The District Court found Smithfield liable for violating both daily

and monthly limits. While acknowledging federal circuit court precedent rejecting such an approach as double counting, the court nevertheless counted each violation of a monthly limit as a violation for every day of that month, and also counted as separate days of violation exceedances of daily limits in months Smithfield had also exceeded the monthly limit for the same substance. App. 32a-33a. Violations of the state phosphorous limit accounted for 86% of the effluent limit violations found against Smithfield.

In assessing a penalty under the CWA, a court is required to consider, among other things, "the economic benefit (if any) resulting from the violation," "any good-faith efforts to comply with the applicable requirements," and "such other matters as justice may require." 33 U.S.C. § 1319(d). In determining economic benefit, the District Court refused to factor in the millions of dollars Smithfield spent to comply with the permit by connecting to HRSD, and refused to give Smithfield credit for good faith efforts to comply with the applicable requirements because Smithfield's understanding of what those requirements were—even though confirmed by the Board—turned out to be wrong, at least in the court's view. App. 49a n.16, 52a-54a.

The court set the penalty at $12.6 million. App. 62a. Thus, in a case in which the court made no finding of bad faith—and in which the penalized party was caught in the middle of a dispute between federal and state regulating authorities—the District Court entered what was at the time the largest civil penalty in the history of the CWA.

Fourth Circuit Proceedings. The Fourth Circuit affirmed, save for a mathematical error that the District Court had concluded was insignificant. App. 25a-26a. The court set out the parties' arguments on liability at length. But instead of independently analyzing those arguments, it simply adopted—with virtually no explanation—the District Court's

legal conclusions. App. 11a-16a. Thus, the Fourth Circuit "concur[red]" that "neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the CWA preclude the EPA from bringing this enforcement action," and that "Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action." App. 15a-16a. As for the penalty issues, the Fourth Circuit rejected Smithfield's arguments that the District Court impermissibly "double counted" violations, failed to give Smithfield credit for its hook-up costs and user fees in calculating economic benefit, and failed to take into account Smithfield's good faith efforts to comply by connecting to HRSD. App. 17a-20a, 22a-28a.

Smithfield timely filed a petition for rehearing and rehearing en banc, which the Fourth Circuit denied. App. 114a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GWALTNEY* AND SECTION 510 OF THE CWA ON THE DISCRETION RESERVED TO THE STATES TO ENFORCE MORE STRINGENT ENVIRONMENTAL STANDARDS THAN THOSE IMPOSED BY FEDERAL LAW.

In enacting the CWA, Congress declared its policy "to recognize, preserve, and protect the *primary* responsibilities and rights of *States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphases added). To this end, Congress not only gave the States primary authority to enforce the limits in the permits they issue under the Act, *see id.*,[4] but specifically reserved to the States in Section 510 of

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[4] *See also Gwaltney*, 484 U.S. at 60 (citing legislative history indicating that Congress "intend[ed] the great volume of enforcement actions

the CWA the authority to "adopt *or enforce*" effluent limitations and standards more stringent than those imposed by federal law. *Id.* § 1370(1)(A) (emphasis added). As this Court's decision in *Gwaltney* underscores, this express congressional reservation of authority would be meaningless if States could not enforce their own, more stringent environmental standards in the manner they deem most beneficial to the public interest *without* interference from EPA.

In *Gwaltney*, the Court made clear that a penalty action brought under the CWA should not be permitted to undermine the efforts of the primary regulatory authority to achieve broad remedial action. There, the Court held that the CWA's "citizen suit" provision then in effect did not confer jurisdiction over suits for past violations, emphasizing that any other interpretation would create a "disturbing anomaly" and a "danger," due to the "potentially intrusive" nature of a penalty action where the primary regulatory authority has decided "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." 484 U.S. at 60-61. As the Court explained, if such a policy decision by the primary regulatory authority could be second-guessed by another enforcer "months or years later, in order to seek the civil penalties that the [primary authority] chose

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[under the CWA] be brought by the State"); *Boise Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1433 (9th Cir. 1991) ("purpose of the Act [is] to afford states as much control as possible over implementation and enforcement of pollution controls"); *American Paper Inst., Inc.*, v. *EPA*, 890 F.2d 869, 873 (7th Cir. 1989) ("legislative history [of the CWA] is replete with statements recognizing that the states should play the leading role in implementing the NPDES system") (footnote omitted).

to forgo, then [its] discretion to enforce the Act in the public interest would be curtailed considerably." *Id.*[5]

In exercising its primary enforcement authority under Section 510 in this case, the Commonwealth was attempting to achieve—and did achieve—precisely the type of broad remedial action contemplated in *Gwaltney*. The Board had no authority to require Smithfield to connect to HRSD and thus completely eliminate its discharges into the Pagan River. In addition, it was faced with Smithfield's legal challenges to the phosphorous limit, which might well have succeeded and prevented the Board from enforcing the limit *at all*. By agreeing that Smithfield would not be required to meet the phosphorous and other state limits until it took "extreme corrective action" that it "otherwise would not be obliged to take," the Board was able to achieve far-reaching, long-term goals—the complete elimination of Smithfield's discharges into the Pagan River (not to mention the removal of the Town of Smithfield's pollutants), as well as the preservation of the phosphorous limit—results undeniably "in the public interest."

Under the principles embodied in Section 510 of the CWA and outlined in *Gwaltney*, EPA should not have been permitted to bring this enforcement action and seriously undermine the Board's ability to achieve the same result in future cases. Without explanation, however, the Fourth Circuit held that "neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the CWA preclude the EPA from bringing this enforcement action." App. 16a. But if the United States is allowed to seek penalties in situations like this one—where the limits involved are imposed solely as a matter of state

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[5] Although the penalty action at issue in *Gwaltney* threatened to undermine the discretion of federal authorities, the Court expressly recognized that "[t]he same might be said of the discretion of state enforcement authorities." 484 U.S. at 61 (emphasis added).

law—States will not be able to exercise the authority explicitly reserved to them by Congress in Section 510 to "adopt or enforce" more stringent environmental standards in the manner *they* believe best serves the public interest. Because a regulated entity has little incentive to work with a State to achieve a costly environmental goal if federal authorities can step in "months or years later, in order to seek the civil penalties the [State] chose to forgo," the result is to impermissibly curtail the discretion explicitly reserved to the States in Section 510. 484 U.S. at 61.[6] *Gwaltney* specifically contemplates and condemns this very result, and the Fourth Circuit's contrary decision merits this Court's review.[7]

This case in fact presents an even more "disturbing anomaly" than the situation in *Gwaltney*. *Id.* at 60. Principles of comity and federalism are expressly embodied in the CWA. *See supra* at 12-13 & n.4. *See also Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government"); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6th Cir.) ("the CWA sets up a system of 'cooperative federalism'"), *cert. denied*, 513 U.S. 927 (1994); *Aminoil*

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[6] When it acts as the primary enforcer of the CWA, the United States often makes "a conscious decision not to seek civil penalties" in order to achieve broader goals. *United States* v. *District of Columbia*, 933 F. Supp. 42, 51 (D.D.C. 1996). The States, when acting as the primary enforcer, should be granted the same discretion and, indeed, Section 510 of the CWA grants it to them.

[7] The clear import of *Gwaltney* has not been lost on the lower courts. *See, e.g., Supporters to Oppose Pollution, Inc.* v. *The Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) ("An Administrator unable to make concessions is unable to obtain them."); *Saboe* v. *Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) ("It is doubtful that an alleged violator would fully cooperate with [the state] to resolve [potential violations] if they [sic] lacked assurance that the same violation would not be the subject of a [separate] suit in federal court at some later time.").

U.S.A., Inc. v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1229 (9th Cir. 1982) (CWA creates a "cooperative federal-state scheme for the control of water pollution" and a "delicate partnership between state and federal agencies") (quotations omitted); *District of Columbia* v. *Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980) (noting "strong current of federalism in the Clean Water Act"). Allowing federal authorities to undermine a State's efforts to enforce its own environmental standards pursuant to an express reservation of authority upsets the balance of power the Act seeks to maintain.

The Eighth Circuit was mindful of such considerations in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999), where the court recently refused to allow a "second enforcement action" by EPA under the Resource Conservation and Recovery Act ("RCRA") "simply [to] fill the perceived gaps it sees in a state's enforcement action." *Id.* at 901. If a second enforcement action were permitted, the court explained, "[c]ompanies that reach an agreement through negotiations with a state authorized by the EPA to act in its place may find the agreement undermined by a later separate enforcement action by the EPA * * *. Such a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of RCRA." *Id.* at 902.[8] In reaching a result contrary to *Gwalt-*

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[8] Although the text of RCRA differs from the CWA in authorizing the States to bring an enforcement action in lieu of the United States, see 42 U.S.C. § 6926(b); *Harmon*, 191 F.3d at 899, the rationale supporting the Eighth Circuit's decision applies here. Congress intended the States to have primary enforcement authority over the programs they administer under both Acts. *See supra* at 12-13 & n.4; *Harmon*, 191 F.3d at 901. And although the United States may bring an action "to enforce any provision" of the CWA, 33 U.S.C. § 1319(g)(6)(A), no such action may be brought where, as here, "a State has commenced and is diligently prosecuting an action under a State law comparable to [federal law]." *Id.* § 1319(g)(6)(A)(ii). Moreover, as *Gwaltney* teaches, the authority to

ney, the Fourth Circuit below—by contrast—clearly lost sight of the same principles embedded in the CWA.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE PRECLUSIVE EFFECT OF SECTION 309(g)(6)(A)(ii) OF THE CWA.

The Fourth Circuit's decision also conflicts with the decisions of other federal circuits on the preclusive effect of Section 309(g)(6)(A)(ii) of the CWA, providing another basis for certiorari. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose" for which this Court grants certiorari "is to resolve conflicts among the United States courts of appeals").

Section 309(g)(6)(A)(ii) precludes a federal penalty action for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law *comparable* to [Section 309(g) of the Act]," 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added), which provides for federal administrative penalty actions. *See id.* § 1319(g). Because Virginia law provides a system of enforcement, penalties, and public participation rights fully "comparable" to that of Section 309(g), EPA's overfile action was precluded by Section 309(g)(6)(A)(ii).

At the time the Board commenced its action against Smithfield, it had the authority to bring a civil action in state court seeking up to $25,000 per day for violations of state permits, *and* the authority to impose administrative penalties in the same amount, subject to consent. *See* Va. Code §§ 62.1-

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"overfile" under the CWA does not include the authority to undermine the state enforcement program by seeking penalties a State has expressly eschewed in exchange for voluntary compliance with a particular remedial plan.

44.15(8c), (8d); *id.* § 62.1-44.32. *Compare* 33 U.S.C. § 1319(g)(2) (administrative penalties of up to $10,000 per day and $125,000 total). Because the threat of judicial enforcement provided a real incentive to enter into consent orders imposing administrative penalties, these two provisions worked in tandem to achieve the same ends as Section 309(g). Moreover, in April 1996—while the Board was still conducting its administrative action and before EPA filed its penalty action—Virginia law was amended to provide for the imposition of administrative penalties *without* consent. *See* Va. Code §§ 10.1-1182, 10.1-1186(5), (10).[9]

In addition, at all relevant times during the Board's enforcement action against Smithfield, Virginia law—like Section 309(g)—provided significant opportunities for public participation by requiring that public notice be given of all proposed enforcement actions and special orders, that the public be allowed to comment on such proceedings, and that the Board consider all comments before taking final action. *See* Va. Admin. Code tit. 9, § 25-31-910(B)(3).

The Fourth Circuit nonetheless held that "Virginia's enforcement scheme [was] not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent

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[9] The Court of Appeals below rejected Smithfield's argument that comparability should be gauged at the time the federal penalty action is filed. *See* App. 13a n.2. But determining comparability at that point is more consistent with the purposes of Section 309(g)(6)(A)(ii), not to mention its text. *See* 33 U.S.C. § 1319(g)(6)(A)(ii) (federal action precluded where "State has commenced and *is diligently prosecuting* an action under a State law *comparable* to [Section 309(g) of the Act]") (emphases added). In any event, the state statutory scheme that existed when Virginia initiated its enforcement action against Smithfield plainly enabled the Commonwealth to promote the goals of the CWA—as is evident from the result secured by the Board in this case—and, thus, was sufficiently comparable to trigger preclusion under the approach taken by other circuits. *See infra* at 19-23.

penalty action." App. 15a-16a. In so holding, the Fourth Circuit effectively embraced EPA's position that state law must "mimic" federal law to trigger preclusion. *See* EPA, *Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act* 4 (1993) ("state law must essentially mimic the substance of the federal provision"), cited in U.S. Ct. App. Br. at 33. That approach not only conflicts with the plain meaning of the statute, *see Webster's Third New International Dictionary* 461 (1986) ("comparable" means "having *enough* like characteristics or qualities to make comparison appropriate," or "permitting or inviting comparison *often in one or two salient points only*") (emphases added),[10] but with the decisions of other circuits categorically rejecting such a restrictive application of Section 309(g). *See, e.g., Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994) (state law need not be "identical" to federal law), *cert. denied*, 513 U.S. 1147 (1995); *North & South Rivers Watershed Ass'n,* v. *Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) (rejecting a "narrow reading" of the provision).

In stark contrast to the myopic inquiry conducted by the Fourth Circuit below, the First and Eighth Circuits have assessed comparability from an entirely different perspective, looking to the "overall [state] regulatory scheme," and considering whether state and federal law have the "same overall enforcement goals." *Arkansas Wildlife Fed'n*, 29 F.3d at 381; *accord Town of Scituate*, 949 F.2d at 556 (looking to whether "overall scheme of the two acts [*i.e.*, state and federal] is aimed at correcting the same violations, thereby achieving the same goals"). Quite unlike the Fourth Circuit, these courts have rejected "a narrow reading of section 309(g)(6)(A), which turns on the logistical happenstance of statutory drafting," and "ignores [the] important

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[10] This Court itself has recognized that "'[c]omparable' * * * does not mean 'identical.'" *Wheeler* v. *Barrera*, 417 U.S. 402, 420 (1974).

considerations" underlying the CWA. 949 F.2d at 556. This approach squares with the plain meaning of "comparable," *supra* at 19, not to mention the "vigorous federalism underlying the Clean Water Act." *United States* v. *Homestake Mining Co.*, 595 F.2d 421, 429 (8th Cir. 1979).

In *Town of Scituate*, the state enforcement agency issued an administrative compliance order under a state statutory provision that did not provide for the assessment of penalties. In rejecting the contention that the provision under which the order was issued was not comparable to Section 309(g)(6)(A)(ii) because it did not provide for penalties, the First Circuit noted that another provision in the same statutory scheme did so provide, and further observed that the two provisions were "two coordinate parts [which] are cogs in the same statutory scheme implemented by the State for the protection of its waterways." 949 F.2d at 556. Accordingly, the court concluded, "[i]t is enough that the [state] statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* The court similarly rejected the contention that the state regime did not provide public participation rights comparable to those found in Section 309(g), holding that "[s]o long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act," regardless of whether the state scheme is "identical to the Federal Act." *Id.* at 556 n.7.

Significantly, in adopting this approach, the First Circuit specifically recognized that "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under-

way do not further [the CWA's] goal" of restoring and maintaining the environmental integrity of the Nation's waterways. *Id.* at 556. Instead, such actions can be "*impediments* to environmental remedy efforts." *Id.* (emphasis added). That is precisely what *Gwaltney* teaches, yet the Fourth Circuit failed to heed this lesson.

Arkansas Wildlife Federation is to the same effect. There, the Eighth Circuit rejected the contention that the state law at issue did not provide public participation rights comparable to those found in Section 309(g). Expressly agreeing with the reasoning of the First Circuit in *Town of Scituate*, the court held that "even if the state law does not contain *precisely* the same public notice and comment provisions as those found in the [CWA]," the "comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the State is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests." 29 F.3d at 381 (emphasis added). In these circumstances, the court held, "the state statute should be presumed comparable unless the facts of the specific case demonstrate" to the contrary. *Id.* at 382.[11]

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[11] The Fourth Circuit's decision also conflicts with *Jones* v. *City of Lakeland*, 175 F.3d 410 (6th Cir. 1999). Expressly relying on *Town of Scituate* and *Arkansas Wildlife Federation*, the Sixth Circuit in *Jones* followed the same approach as the First and Eighth Circuits. *See* 175 F.3d at 415-417. There, the court held that the state law at issue contained penalty and public participation provisions comparable to Section 309(g) where federal and state law shared the same "overarching goals" and "significant commonalities." *Id.* at 415. Notably—in rejecting "a narrow, exacting interpretation of the word 'comparable' that requires one-for-one equivalency"—the Sixth Circuit specifically recognized that the bar on penalty actions "avoid[s] presenting an offending party with *inconsistent* obligations imposed by a federal court, as a result of a

Under the approach of the First and Eighth Circuits, Virginia's "overall regulatory scheme" is "sufficiently comparable" to the federal program under Section 309(g) to preclude EPA's overfile action, "even if the [Virginia] law does not contain precisely the same * * * provisions as those found in the federal CWA." *Id.* At the time EPA brought this overfile action—and the Board was still conducting *its* enforcement action—Virginia law provided for the imposition of administrative penalties without the consent of the violator. Even at the time the Board commenced its action, Virginia's overall statutory scheme contained "penalty assessment provisions comparable to the Federal Act * * * [and] the overall scheme of the two acts [was] aimed at correcting the same violations, thereby achieving the same goals." 949 F.2d at 556. In particular, the judicial and administrative penalty provisions in effect were "two coordinate * * * cogs in the same statutory scheme implemented by the State for the protection of [Virginia's] waterways." *Id.* Moreover, by requiring that public notice be given of all proposed enforcement actions and special orders, that the public be allowed to comment on such proceedings, and that the Board consider all comments before taking final action, Virginia guarantees interested citizens a "meaningful opportunity to participate at significant stages of the decision-making process," 29 F.3d at 381, and "adequately safeguards their legitimate substantive interests." *Id.*; *accord* 949 F.2d at 556 n.7. Finally, any doubt as to whether the Virginia scheme advances the same important interests as the CWA is answered by the extreme corrective action that the Board

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[penalty] action, and by another court or administrative agency, as a result of an independent * * * state agency action." *Id.* (emphasis added). In failing to apply the bar here, the Fourth Circuit subjected Smithfield to precisely the sort of "inconsistent obligations" Congress sought to avoid. The Sixth Circuit has granted rehearing en banc in *Jones*, *see* 204 F.3d 680 (1999), underscoring the importance of this issue.

secured in this case—the complete elimination of Smithfield's discharges into the Pagan River.

The Fourth Circuit's contrary decision deepens an existing conflict on the scope of Section 309(g)(6)(A)(ii). In contrast to the First and Eighth Circuits, the Ninth Circuit—like the Fourth Circuit below—has given that provision an extremely narrow reading. *See Citizens for a Better Env't-Cal.* v. *Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997). Expressly rejecting the First Circuit's reasoning in *Town of Scituate*, the Ninth Circuit held in *Union Oil* that Section 309(g)(6)(A)(ii) does not apply where the provision under which administrative action is taken does not provide for penalties. *Id.* at 1117-18. This conflict has further manifested itself among district courts in other circuits.[12] Commentators have highlighted the conflict and have expressed the need for its resolution.[13] This case

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[12] *Compare Old Timer, Inc.* v. *Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1113-14 (D. Colo. 1999) (citizen suit precluded only when state has commenced an administrative penalty action against a polluter); *Friends of Santa Fe County* v. *LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D.N.M. 1995) ("section [309(g)(6)(A)(ii)] is narrowly drawn; its preclusionary effect applies only when * * * a state is in the process of collecting or has collected administrative penalties"), *with Sierra Club* v. *Colorado Ref. Co.*, 852 F. Supp. 1476, 1484-85 (D. Colo. 1994) (rejecting argument that state must actually seek penalties before citizen suits are precluded); *New York Coastal Fishermen's Ass'n* v. *New York City Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) ("it cannot be reasonably argued that only when a penalty is actually imposed that a citizen suit is precluded"; such a reading is "an overly technical interpretation" that would "unnecessarily undermine state and local enforcement efforts").

[13] *See, e.g.*, Heather L. Clauson, *How Far Should the Bar on Citizen Suits Extend Under § 309 of the Clean Water Act?*, 27 Envtl. Law 967, 968 (1997) ("conflict among the circuits has resulted which needs to be resolved"); Julia A. Glazer, *The Clean Water Act Enforcement Provision: What Constitutes Diligent Enforcement Under Comparable State Law*, 23 No. Ky. L. Rev. 129, 129 (1995) ("The absence of guidance from the

presents an ideal opportunity for this Court to provide much-needed guidance.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE NOTICE REQUIRED BEFORE A PARTY MAY BE PENALIZED FOR VIOLATING REGULATORY REQUIREMENTS.

Further heightening the need for review is the conflict between the Fourth Circuit's decision and the decisions of other federal courts of appeals on the notice required before a party may be penalized for violating regulatory standards.

It is a fundamental principle of due process that a party receive "fair notice" before being deprived of property. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "[B]ecause we assume that [a party] is free to steer between lawful and unlawful conduct, we insist that laws [provide] a reasonable opportunity to know what is prohibited, so that [a party] may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). As a result, a party cannot be assessed civil penalties under a regulatory regime where it lacks fair warning of prohibited conduct. *See, e.g., General Elec. Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

United States Supreme Court * * * concerning this provision has produced conflicting opinions within the federal circuit courts."); Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 Nat. Res. J. 555, 582 (1995) ("Currently, the circuits are in conflict regarding the nature and scope of subsection 309(g)'s preclusiveness."); Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. Envtl. L. J. 211, 232 (1995) ("The requirement that state enforcement be pursuant to a law that is 'comparable' to section 309(g) has also led to * * * wildly inconsistent application of [the] bar.").

Here, Smithfield plainly lacked notice that—in EPA's view—it was violating the CWA. The phosphorous standard that Smithfield was penalized for allegedly violating is a state limit not required by federal law. The Board and Smithfield agreed to a plan that relieved Smithfield from meeting that state limit while the connecting pipeline to HRSD was being constructed, in exchange for Smithfield's withdrawal of its legal challenges to the limit. EPA received notice of the agreement and raised no objection. Smithfield subsequently sought and received assurances from the Board that it would be in compliance with the phosphorous and other state limits so long as it connected to HRSD within the requisite time-frame and that it need not meet those limits during the interim. EPA received notice of these assurances and once again remained silent. EPA also undertook a close review of the project in connection with the Commonwealth's approval of over $50 million in assistance from a fund largely funded by EPA for HRSD to upgrade its facilities to implement the 1991 Special Order. Smithfield knew that EPA was aware of its dealings with Virginia regulatory authorities, and thus had every reason to believe that it was in compliance with the phosphorous and other state limits. Yet despite remaining silent and acquiescing for five years, EPA sued Smithfield for the failing to meet the very limits the Board had assured Smithfield it need not meet pending connection to HRSD.

The Fourth Circuit's decision condoning EPA's action conflicts with numerous decisions of other circuits on the minimum notice required in such circumstances. In *General Elec. Co.* v. *EPA*, *supra*, for instance, EPA interpreted a regulation mandating disposal of certain materials as prohibiting their distillation prior to disposal, and fined a company that had engaged in pre-disposal distillation. In setting aside the fine, the D.C. Circuit held that the company had not received fair notice of EPA's interpretation because two regional offices had apparently advised that pre-disposal

distillation was permitted. Such "confusion" over the meaning of the regulation was "evidence that the agency's interpretation of its own regulation could not possibly have provided fair notice." 53 F.3d at 1332.

Likewise, in *Lloyd C. Lockrem, Inc.* v. *United States*, 609 F.2d 940 (9th Cir. 1979), and *Kent Nowlin Construction Co.* v. *Occupational Safety & Health Review Commission*, 593 F.2d 368 (10th Cir. 1979), federal regulators cited companies laying sewer lines for violations relating to "trenches" and "excavations" as those terms were used in federal regulations. Noting the "disagreement among the Secretary's compliance officers, the administrative law judge, and even among the commissioners of the Review Commission as to the interpretation, interrelationship and application of the regulations involved," 593 F.2d at 370; *accord* 609 F.2d at 944, the Ninth and Tenth Circuits, respectively, held that the companies had not received fair warning that the regulations applied to their activities. As the Tenth Circuit put it, regulated entities "should not be penalized for deviation from a standard the interpretation of which * * * cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedures for its enforcement." 593 F.2d at 371; *accord* 609 F.2d at 944.

Similarly, in *Diamond Roofing Co.* v. *Occupational Safety & Health Review Commission*, 528 F.2d 645 (5th Cir. 1976), the Fifth Circuit held that a group of roofing companies had not received fair notice that a regulation requiring that railings be placed around open-sided floors applied as well to open-sided roofs where "there was disagreement even among OSHA Compliance Officers as to whether [the regulation] applied to open-sided roofs as well as floors." *Id.* at 649.

Here, even though state and federal authorities clearly disagreed over whether Smithfield was in compliance with the state phosphorous and other limits—and Smithfield relied

on assurances from the primary regulating authority that it would be in compliance by investing millions of dollars in taking extreme corrective action—the Fourth Circuit decided that Smithfield had fair notice that it was violating the CWA. *See* App. 12a, 15a-16a. That ruling squarely conflicts with the decisions of the D.C., Ninth, Tenth, and Fifth Circuits holding that parties lacked fair notice where authorities differed on whether certain conduct was prohibited or required. The lack of fair notice afforded Smithfield is particularly intolerable given that EPA sat back and did nothing for five years while Smithfield acted with the approval of state authorities, allowing alleged violations to pile up before bringing suit. *Cf. United States* v. *AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994) (refusing to allow EPA "to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted * * * by which time a defendant would have accrued a potential liability in excess of $40 million even though it had been operating under a permit valid on its face and never before challenged").

Finally, the Fourth Circuit's decision conflicts with the Sixth Circuit's decision in *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327 (6th Cir. 1978). There, the court held that a manufacturer lacked fair warning that an OSHA regulation required "guarding" of certain machines where, among other things, "common understanding and commercial practice" was that guarding was not required. *Id.* at 1336. So too here, Smithfield acted pursuant to the "common understanding" that a regulated entity should be able to rely on an agreement with state authorities on the method of complying with a state effluent limitation—particularly where federal authorities have notice of that agreement. But the Fourth Circuit did not consider that basic understanding in determining whether Smithfield had fair notice.

* * *

Although the multiple conflicts engendered by the decision below alone provide a compelling basis for review, certiorari is particularly appropriate in view of the extraordinarily important concerns raised by this case. The Fourth Circuit's decision is an affront both to the principles of federalism and comity embodied in the CWA and to notions of fundamental fairness embodied in the notice requirement of the Due Process Clause. As evidenced by the numerous amici who participated in the proceedings below,[14] the decision has vast implications for regulated entities, which—having invested billions of dollars in compliance efforts—now potentially face "duplicative and inconsistent enforcement" actions such as those to which Smithfield was subjected.[15] This Court should grant certiorari to preserve the delicate balance of power Congress so carefully sought to maintain in the CWA, and to ensure that parties are treated fairly—and afforded adequate notice of whose word controls—in those circumstances when federal and state authorities collide.

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[14] The following associations and their members filed briefs below in support of Smithfield's position: American Automobile Manufacturers Association; American Meat Institute; American Petroleum Institute; Independent Petroleum Association of America; Integrated Waste Services Association; National Association of Manufacturers; Michigan Chamber of Commerce; Pennsylvania Chamber of Business & Industry; and Colorado Association of Commerce and Industry.

[15] Br. *Amici Curiae* of the American Automobile Manufacturers Association, *et al.*, at 3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL H. COLE
CHARLES T. GRIFFITH
SMITHFIELD FOODS, INC.
200 Commerce Street
Smithfield, Virginia 23430
(757) 365-3030

PATRICK M. RAHER
JOHN G. ROBERTS, JR.*
JAMES T. BANKS
GREGORY G. GARRE
LORANE F. HEBERT
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioners